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VELLASAMY PONNUSAMY & ORS

v.

GURBACHAN SINGH BAGAWAN SINGH & ORS

B

HIGH COURT MALAYA, IPOH
ABDULL HAMID EMBONG J
[CIVIL SUIT NO: 22-114-94]
23 JANUARY 2006

C ***LAND LAW:*** *Sale of land - Beneficial ownership - Whether original purchasers of land retained an equitable or beneficial interest in said land that was not extinguished despite various subsequent dealings with it - Whether original purchasers had rights to said land since first defendant purchased said land as their trustee*

D ***LEGAL PROFESSION:*** *Liability as fiduciary - Conflict of interest and duty - Whether first defendant acted as a solicitor for original purchasers of land - Whether a fiduciary duty arose - Whether first defendant purchased said land in his personal capacity or on behalf of original purchasers*

E ***CIVIL PROCEDURE:*** *Representative action - Requirements - Class of persons with common interest and common grievance - Whether representative action properly constituted*

F The four plaintiffs in the present suit were the purchasers or sub-purchasers of some plots of land ('the said land') from one Syarikat Pembinaan Perusahaan Kemajuan Bhd ('SPPKB'); they also purported to represent 213 other sub-purchasers of plots within the said land. The first defendant ('D1') was an advocate G and solicitor who had initially attended to the woes of some of the purchasers and had, subsequently, in his personal capacity, bought the said land. This purchase by D1 was made by way of a tender, which was undertaken by the receivers and managers of the 3rd defendant, one Simpang Empat Plantation Sdn Bhd H ('SEP'). The plaintiffs, in this suit, sought to be declared as either the lawful or beneficial owners according to the plots that they held under their agreements with SPPKB. The two central issues requiring determination were: (i) whether the plaintiffs, as original purchasers of the said land, retained an equitable right in the said I land that was not extinguished despite the various subsequent dealings with it; and (ii) whether D1 had acted as a solicitor for the plaintiffs and, thus, D1 had purchased the said land as their

trustee and that the purchase was not done by D1 in his personal capacity but on behalf of the plaintiffs. Another issue that required consideration was whether or not this suit was a properly constituted representative action.

Held (dismissing the suit):

(1) The agreements for the purchase of the said land were actually for the holding of shares in SPPKB, although some of the agreements were for plots of land. The said land was operated by SPPKB as an estate; thus, the clause found in the agreements that payments for the land plots were deductible from the profits of the produce of the estate. SPPKB, on the other hand, never held the said land and was not, at any time, its registered owner. The actual owners of the land were SEP, which also had a locus standi to file this suit, but did not do so. Even SPPKB, in which the plaintiffs had shares, did not sue. It is trite that shareholders have no property, legal or equitable, in the assets of the company. This court should not look behind the corporate veil in determining the interests of the plaintiffs in this case since the distinct corporate personality of the company should remain intact. The plaintiffs could not, therefore, be declared as either having an equitable or beneficial interest in the said land. (para 56)

(2) The facts of the case did not show that a solicitor-client relationship existed between D1 and the plaintiffs; thus, there was no fiduciary duty owed by D1 to the plaintiffs. The evidence did not show such a contract between the plaintiffs and D1 or D2, and this court would not make a contract for the parties in this case. The evidence also had not proved that D1 had manipulated the situation and had exercised undue influence on the plaintiffs. On the contrary, D1 had been open and transparent in his dealings with them. The bid made by D1 was made in his personal name and not on behalf of the sub-purchasers, and there was overwhelming evidence to support this finding. (para 55)

(3) The exact identities of the persons whom the four plaintiffs were representing were not an impediment to commencing a representative action so long as they were a class of persons with a common interest and a common grievance. In this case, the representative action was properly constituted although if

A the plaintiffs were to succeed, they would be entitled to different measures of relief. The 213 unnamed plaintiffs whom the four plaintiffs represented need not give their consent although they would not be liable to costs. (para 71)

B **Case(s) referred to:**

Abdul Rahim v. Ling How Doong [1994] 2 SLR 668 ***(refd)***

Ang Hiok Seng v. Yim Yut Kiu [1997] 1 CLJ 497 FC ***(refd)***

Batu Kawan v. Pentadbir Tanah Daerah Seberang Prai Selatan [2002] 1 CLJ 633 FC ***(refd)***

D & C Bank Bhd v. Lam Chuan Coy & Anor [1989] 1 MLJ 318 ***(refd)***

C *Datuk Jaginder Singh v. Tara Rajaratnam [1983] 2 MLJ 194* ***(refd)***

EH Riyid v. Eh Tek [1976] 1 MLJ 262 ***(refd)***

Goh Beng Seng v. Dol Dollah [1970] 2 MLJ 95 ***(refd)***

Jok Jau Evong & Ors v. Marabong Lumber Sdn Bhd & Ors [1990] 2 CLJ 625; [1990] 2 CLJ (Rep) 169 HC ***(refd)***

D *Kimlin Housing Development Sdn Bhd v. Bank Bumiputra (M) Bhd & Ors [1997] 3 CLJ 274 SC* ***(refd)***

Kumpulan Sua Betong Sdn Bhd v. Ezan Sdn Bhd & Anor [1993] 3 CLJ 337 SC ***(refd)***

Lim Nyuk Chan v. Wong Sz Tsin [1964] 1 MLJ 200 ***(refd)***

Melantrans Sdn Bhd v. Carah Enterprises Sdn Bhd & Anor [2000] 3 CLJ

E *127 CA* ***(refd)***

Mewah Plus Property Sdn Bhd v. Kluang District Government Servants Co-Op Housing Society Ltd [2000] 2 AMR 1433 ***(refd)***

Munusamy v. PP [1987] 1 MLJ 492 ***(refd)***

Palmco Holding Bhd v. Sakapp Commodities (M) Sdn Bhd & Ors [1988] 2

F *MLJ 624* ***(refd)***

PP v. Ng Lai Huat [1990] 1 CLJ 1190; [1990] 2 CLJ (Rep) 774 HC ***(refd)***

Rengamah Rengasamy v. Tai Yoke Lai [1998] 1 CLJ 987 HC ***(refd)***

Sunrise Sdn Bhd v. First Profile [1997] 1 CLJ 529 FC ***(refd)***

Tai Lee Finance Co Sdn Bhd v. Official Assignee & Ors [1983] 1 CLJ 183;

G *[1983] CLJ (Rep) 387 FC* ***(refd)***

Tengku Abdullah v. Mohd Latiff Shah Mohd [1997] 2 CLJ 607 CA ***(refd)***

The Duke of Bedford v. Ellis & Ors [1901] AC 1 ***(refd)***

Tong Tai Holdings Sdn Bhd v. Jimi Mantali & Ors [2003] 6 CLJ 170 ***(refd)***

H *UMBC Bhd & Anor v. Pemungut Hasil Tanah Kota Tinggi [1984] 2 CLJ 146; [1984] 1 CLJ (Rep) 51 PC* ***(refd)***

Vassiliades v. R [1945] PC ***(refd)***

I

Legislation referred to:
Contracts Act 1950, s. 24
Evidence Act 1950, ss. 101, 114(g), 138
National Land Code, s. 214A
Rules of the High Court 1980, O. 15 r. 12
Stamp Act 1949, s. 52(1)

For the plaintiffs - DP Vijandran (NP Ramachandren with him); M/s NP Ramachandren & Assoc
For the 1st & 2nd defendants - Gurbachan Singh; M/s Bachan & Kartar
For the 3rd defendant - Leong Kok Keong; M/s Kean Chye & Sivalingam
For the 4th defendant - J Ajit Singh; M/s J Ajit & Co
For the 5th defendant - Ling Hua Keong; M/s Isa Ling & Mok

Reported by Suresh Nathan

JUDGMENT

Abdull Hamid Embong J:

[1] The main characters in this case are described as and referred to according to the following citings and abbreviations:

i) the plaintiffs – these are also referred to in this judgment and the notes of evidence (NOE) as purchasers or sub-purchasers to the plots in the land in question. This reference it must be noted was made only for the sake of convenience and not, as agreed by all parties, in recognition of their status as purchasers as such. The four named plaintiffs, three of whom did not give evidence, purport to represent 213 other persons who are also described as sub-purchasers to plots in the said land.

ii) D1 is Gurbachan Singh, the first defendant, an advocate and solicitor who initially attended to the woes of the residents of Simpang Empat Estate, some of whom are purchasers of the plots in the said land. D1 subsequently in his personal capacity bought the land which contains the plots allegedly bought by the plaintiffs earlier. The purchase by D1 was made by way of a tender, which was undertaken by the Receivers and Managers of the 3rd defendant. In this suit, D1 acted on his own behalf and also for D2.

iii) D2 is Tetuan Bachan and Kartar, the second defendant, a legal firm. D1 is a partner of D2.

iv) D3, Simpang Empat Plantation Sdn Bhd or SEP, is the third defendant. This was a company set up to facilitate the transfer of the said land to it from the original registered proprietor ie, Nam Bee Rubber Estate Sdn Bhd (now referred to as Nam Bee). In this suit, D3 appeared through its Receivers and Managers.

v) D4 is the fourth defendant ie, Regal Establishment Sdn Bhd a company formed by D1 and his wife and friend (Manjeet). The said land was transferred to D4 and later D4 was sold to two companies. The said land is currently registered in the name of Regal, ie, D4. D1 no longer has any interest in D4.

vi) D5 is the fifth defendant, MBf Finance Bhd from whom D3 took a second loan of RM 2.5 million. MBf later appointed Mssr. Ernst & Young as Receivers and Managers (R & M) to take over the operation of D3 when it failed to service that loan. The R & M later put the said land on sale by tender.

vii) The subject matter in this dispute is referred to as 'the said land' which is all the land known as PN 35553, Lot 9106, Mukim of Hutan Melintang, Hilir Perak.

The Claim

(see Pindaan Pernyataan Tuntutan Pinda Semula Kedua).

[2] Essentially the plaintiffs are seeking for the following declarations and orders:

1. That D1 and D2 were at all material times the solicitors acting for the plaintiffs with a fiduciary duty in all the benefits and interests held by them to the plaintiffs in the purchase of the said land by way of tender.

2. That D1 held the said land which D1 purchased from the R & M, in trust for the plaintiffs.

3. That the four named plaintiffs or other fit and proper persons be now declared as new trustees in place of D1 and that the R & M make rectifications to the agreement dated 30 April 1994 (between the R & M and D1) to include the new trustees appointed by this court.

4. To declare certain sale and purchase agreements between D1 and some sub-purchasers as null and void and that D1 and D2 refund with 8% p.a. interest, all monies paid under those agreements or alternatively rescission of those agreements.

5. That the transfer of the said land to D4 be declared invalid, null and void.

6. That the said land be held under trust for the plaintiffs on terms determined by this court.

7. That the plaintiffs be declared as either the lawful or beneficial owners according to the plots they held under their agreements with SPPKB.

8. That there be an inquiry and accounts taken in respect of the usage and profits of the said land by D1 and/or D4, and that such profits be paid to the plaintiffs.

[3] The lengthy notes of evidence (859 pages) was the result of a protracted trial which for various reasons, could only be concluded in November 2005. The plaintiffs called 15 witnesses and produced 93 exhibits and the defendants called 18 witnesses producing 157 documents. Despite its length, the body of evidence merged to establish two key issues which surfaced for this court's determination and upon which counsel for all parties agreed upon which this suit hinged. These two central issues are:

1. That the plaintiffs as original purchasers of the said land retained an equitable right in the said land which was not extinguished despite the various subsequent dealings with it.

2. That D1 acted as a solicitor for the plaintiffs and thus D1 had purchased the said land as their trustee, and that the purchase was not done by D1 in his personal capacity but on behalf of the plaintiffs.

3. This court at the end of learned counsel for the plaintiff's submission had also requested that it be addressed on the issue of whether this suit is truly a representative action.

[4] Now for the salient facts, which are abridged to meet the issues above.

A **Facts**

[5] According to SP8, Renganathan (whose testimony appears at pp. 42 to 124 NOE) who was at the material time a director of SEP, a company called Syarikat Pembinaan Perusahaan Kemajuan
B Bhd, (SPPKB) was set up on 26 November 1979 to go into the housing business. When it failed in that undertaking, SPPKB, of which SP8 was also a director turned its attention into the agriculture business. SP8 said that SPPKB had bought a piece of land measuring 3641.165 acres from Nam Bee being its registered
C owner for this purpose. SPPKB then entered into various agreements with the public purportedly to sell shares/or plots in the said land. For the sale of shares, each share was pegged at 3 acres, after SEP had divided the said land into 1000 lots (3000 acres). Each lot, according to SP8 was priced at RM10,500.
D Exhibit P4 is an example of an agreement for the sale of plots by SPPKB, while P5 is an example of an agreement to take up shares in the said land. Essentially, under the agreement, SPPKB as the vendor agreed to develop with infrastructures, and manage the said land into a palm oil estate within 48 months with each
E purchaser participating in the produce from his share/plot in the land. The purchaser shall pay the balance sum within 48 months, partly in cash and partly in kind *viz* by deducting 60% of "the sale of produce harvested each time" (see cl. 2 of the agreement). This second manner of payment of the balance sum immediately
F strikes me as an odd arrangement and one which is not practicable, since the said land was then raw and there was direct evidence to say that it was uncultivated and under jungle. Thus, in my view, it will not yield any produce in the first 48 months, since the gestation period of palm oil, as this court will take judicial
G notice, takes much longer than that. Altogether, according to SP8, 585 purchasers entered into such agreements with SPPKB. (See full list at p. 42).

[6] The said land was then transferred to SEP (D3), a newly
H formed company, which according to SP8 was set up for the purpose of acquiring the said land. The initial directors of SEP were from Nam Bee. They were later replaced by directors from SPPKB, with SP8 assuming the position of Managing Director of SEP. As for the agreements with all the sub-purchasers SP8 also
I signed those agreements as the Managing Director of SPPKB. To raise funds, SEP borrowed from Maybank (RM 500,000 in 1985 and overdraft facility for RM500,000) and also from MBf Finance ie, D5 for RM2.5 million. For the loan from D5, it was a

requirement that the management of SEP be run by a professional company called Plantation Agencies S.B. (PASB). After one year under the management of PASB, it was found that SEP could not repay its loan to D5. For that loan, a charge and a debenture (D134) was also created in favour of D5 without the knowledge of the sub-purchasers. Pursuant to the powers within the debenture, D5 had on 12 May 1992, appointed Receivers and Managers (R & M), from the audit firm of Ernest & Young (see D139). According to SD17, a manager for D5, he and some other officers, had gone into the said land as part of the inspection procedure undertaken by D5 before the loan was approved. He said he had not seen anyone on the said land. This piece of evidence, which this court accepted, clearly contradicted SP8's evidence who said that SD17 had seen the sub-purchasers on the said land and had asked about them from SP8 who told SD17 that they were sub-purchasers. I chose to accept SD17's evidence on this matter in preference to what was claimed by SP8. I find SP8 not to be a reliable witness. An example of his lack of credibility was his admission that he had lied to Maybank in his application for a loan, by not letting the bank know of the existence of the sub-purchasers because this would jeopardise the loan application (see p. 93 NOE). SP8 also lied when he said that he had informed the sub-purchasers that the said land was transferred to SEP (see p. 99 NOE).

[7] The R & M, pursuant to their powers under the deed of debenture immediately moved in to manage SEP. Dato' Robert Lim SD12, the main receiver and manager (his testimony is at pp. 755-807 NE) appointed a team led by SP13 to assist him to manage the affairs of SEP. He found SEP without any audited records or account. SEP too had no income to pay its debt. SD12 said SEP had "maybe enough to pay the salaries of two staff". Its debt was by then some RM3.8 or RM 3.9 million. It had no business activities. SP13 had reported to SD12 that there were a few squatters on the said land. SD12 decided to sell the said land. He had before that written to the SEP directors asking for their views if they knew of any parties to take over the estate. There was no response from any of the directors. In fact, in spite of SD12's various letters to the directors he had not met any of them from his appointment till retirement. SD12, referring to the sub-purchasers as squatters, stated in evidence that he was not aware of their agreements with SPPKB and that those agreements had nothing to do with SEP.

[8] SD12 then advertised the sale of the land by public tender (see D143) and received only one offer that is from D1 who paid the R & M a RM400,000 deposit. The sale could not proceed as Renganathan took out an injunction and obtained an order dated 24 September 1992 (D144). That order was set aside on 23 December 1993 (see D145). A second tender was advertised in early 1994. SD12 had instructed SP13, his assistant, not to speak to any of the sub-purchasers. To him they are squatters and posed as the biggest hinderance to the sale. For the second tender only D1 responded. His bid was in his personal name according to SD12. The tender procedure was explained at length by SD12. According to him the property was run down and badly managed. D1 was successful in the second tender and an agreement of sale of the said land was signed with the R & M on 30 March 1993 (see D73). The sale price was RM4.85 million which SD12 stated as sufficient to repay the loan in full and the fees due to the R & M, with a balance of RM20,000 which was deposited with D5 since none of the SEP directors could be contacted. SD12 stated that he gave evidence for SEP and do not require any instructions from the directors in representing SEP. He stated that under the Companies Act 1965, as a receiver and manager he had to act independently and had to account and report to the Registrar of Companies. He also said that he did not require any consent from D5 for anything he did with SEP. Overall, SD12, in my view came out solid and sincere and I found him a credible witness.

[9] The above accounts of the facts are sufficient for this court to answer the first issue ie, whether there was a valid sale of the said land and consequently whether the plaintiffs retain a beneficial right in it.

[10] Learned counsel for the plaintiffs has argued that D3 is liable to the sub-purchasers since D3 had stepped into the shoes of SPPKB who had originally entered into the agreements with the sub-purchasers. Learned counsel urged this court to lift the corporate veil of D3 to make a finding that there was a corporate link between SPPKB and D3. It was also submitted that the agreements were actually for the sale of plots of land and not for shares in the said land. The defendants had submitted otherwise, ie, that the agreements were actually for shares within the land. Counsel for the defendants had also strenuously argued that the sub-purchasers rights, if any, were only as against SPPKB and not against D3. Learned counsel for the plaintiffs submitted that the

defendants had not pleaded this defence since all that was pleaded in the statements of defence was that the defendants either had no knowledge or did not admit to the agreements. I agree with the defence's stand that it is not for the defendants to plead the exact nature of the agreements which should be in the sole knowledge of the plaintiffs. It is in fact for the plaintiffs to prove their allegations. As such the defence's general averments are no bar to them raising this issue on the nature of the agreements.

[11] Looking at the agreement itself (see p. 12 of AB1 as a sample) it is in my view that this was an agreement to purchase shares in the said land. The shares are however pegged to a fixed acreage (ie, 3 acres per share). Payments for the shares are by instalments, with part of it being paid from the produce of the harvest. Clause 5 states that if the purchaser failed in 3 consecutive monthly payments then there will be a forfeiture on 1/3 of payment made and a refund of 2/3 of the same, after which the purchaser has no further claim to the plot or against the vendor. This clause is not typical of one found in a simple sale and purchase agreement for land. The agreement (cl. 6) also provided that the vendor clear the said land, provide for its infrastructure and further manage and provide for labourers as would a good estate be managed and maintained. It seems to me that, by this agreement, the sub-purchasers initially would own shares in the land which would be managed and maintained by the vendor as an estate, with the sub-purchasers participating in the profits from the harvest, on the basis of their shareholdings. At the end of the day when all dues are paid, part by cash instalments and partly from deduction of the harvest, the sub-purchasers would become owners of the plots allotted to them, according to their shareholdings. Some agreements eg. the Arulanandam agreement at page 12 of AB1 entitled the purchasers to share certificates (cl. 14) upon completion of all payments, while others (eg. p. 18 of AB1) made no mention of such share certificate. In this instant case, it is my finding that the sub-purchasers anticipated being owners of their respective plots after all dues are paid to the vendors, although the agreements are seemingly for shares in the said land. The reference to shares in the agreement, is to me, for shares in the profits from the harvest, depending on the number of shares each sub-purchaser had. Thus

at the end of the day, the sub-purchasers are actually looking at how much land (as opposed to shares) they would own in the said land. Thus it is my view that some of these agreements are for the purchase of shares initially, that the sub-purchasers had a stake in the form of shares to the produce of the said land which would be run and managed by the vendor as an estate.

[12] Since the subject matter of the agreements is the said land then it is only logical for this court to look at that very subject matter first to determine if the plaintiffs had any equitable title in what they purportedly had purchased. In the process this court will also need to determine the validity of those agreements and if indeed title had passed to the plaintiffs.

[13] The original registered proprietor to this land was Nam Bee. It was then, to recount, transferred to D3 who had borrowed from, and created a charge and debenture in favour of D5 to effect this purchase. Meanwhile SPPKB had entered into these agreements with the sub-purchasers. The plaintiffs are now claiming that SPPKB had bought the land from Nam Bee on 5 December 1979. Firstly, it must be noted here that it was not in dispute that there was no sale and purchase agreement signed between Nam Bee and SPPKB (see SP8's evidence at page NOE testifying to this fact). Secondly it is an undisputed fact that SPPKB were never the registered owners of the said land. The claim of the sub-purchasers was made based on 2 documents ie, a receipt (P38) and a Declaration of Trust (P40). There was however no evidence adduced that the balance of the purchase price was ever paid to complete the sale, nor was anyone from Nam Bee called to testify to this fact. And subsequently, a so-called supplementary agreement (P41) was made. It was the plaintiffs' case that D3 (SEP) was formed as a subsidiary of Nam Bee so that the said land could effectively be transferred to it. The 'lifting of the corporate veil point' was submitted by learned counsel for the plaintiffs to show the existence of a nexus between Nam Bee and D3 and that D3 was set up in the main as a vehicle to effect the registration of the sale. The cases of *Sunrise Sdn Bhd v. First Profile* [1997] 1 CLJ 529 and *Tengku Abdullah v. Mohd Latiff Shah Mohd* [1997] 2 CLJ 607 were cited to support a justification of lifting the corporate veil in this instance. The ratio from *Sunrise* relied upon by learned counsel for the plaintiffs was this:

In cases where there are signs of separate personalities of companies being used to enable persons to evade their contractual obligations or duties, the court would disregard the notional separateness of the companies.

[14] From the passage it is my view that the notion of lifting the corporate veil could be used therefore only in a limited way, ie, where the defence had raised the issue of separate corporate legal entities, not as here, where the plaintiffs are using it as a sword. Further, this issue was not even pleaded as part of the plaintiffs' case. They should not therefore be allowed to rely on this maxim to prove their case. Be that as it may, it was not the defence's case that these separate legal entities were set up to evade their respective contractual obligations. The defendants are merely saying that Nam Bee never sold the said land to SPPKB, and the latter never had a title to that land, either legal or beneficial. It was submitted for the plaintiffs that SPPKB had paid a deposit of RM51,000 to Nam Bee as part payment of the purchase price (see P38). A declaration of trust (P40 – see pp. 24-27 AB1) was then executed between an appointed trustee, Tan Ann Loong (director of the Nam Bee Board) and SPPKB, in which it was stated that the said land would be transferred to SEP (D3). It was declared in the trust instrument that the trustee shall hold the moneys received in payment as well as the said land in trust for the SPPKB. The Declaration of Trust (cl. 4) also provided that SPPKB shall pay the balance sum of RM2,042,856, failing which the said trust deed would become null and void.

[15] The evidence shows that the full purchase price was never paid by SPPKB, which, I would hold, triggered the termination cl. 4 of the trust deed. In any event, SPPKB and D3 (SEP) remained, to this day, separate legal entities and there is in my view, absolutely no justification to lift the corporate veil in favour of the plaintiffs. It is true that SPPKB and SEP shared a common director in Renganathan, SP8. But this alone does not detract from the most crucial fact that SPPKB was never the registered proprietor to the said land. It is also not proven whether the trustee Tan Ann Loong, was acting personally or on behalf of Nam Bee, although there is stated in the preamble of the trust instrument that he had the consent and approval of the Directors of Nam Bee to receive the RM51,000 deposit from SPPKB. Clause 2 of D40 speaks of the money being held in trust until a further proper agreement is made. No such agreement was

produced. There was moreover, no evidence to show that the trustee was authorised to hold the said land on trust from SPPKB. No company resolution of Nam Bee was adduced to prove that such approval was given to Tan Ann Loong to undertake a matter of such great significance and importance. Further, the said deed of trust was never indorsed on the title of the said land.

[16] Without a legal capacity as the registered proprietor to the said land, how could SPPKB enter into the agreements with all the sub-purchasers, purportedly to sell plots or even shares in the said land? How could it pass any valid titles to them? By tying D3 to Nam Bee, and also D3 to SPPKB it did not in any way clothe SPPKB with a legal capacity to enter into any contract, such as these agreements with the sub-purchasers.

[17] There are also legal constraints to overcome. Firstly the title of the said land carried with it a restriction in interest worded in the common manner as such:

> Tanah yang dipajak ini tidak boleh ditukar nama, digadai atau dipajak kecilkan ataupun dijual melainkan dengan kelulusan bertulis daripada Menteri Besar, Perak.

[18] Now, even if those documents referred to in submission by learned counsel for the plaintiffs ie, P38, P40 and P41, as collectively, capable of being read as having created an obligation to sell the said land, that "contract" would still be voidable at the instance of fulfilling this condition to its sale. There was no evidence forthcoming that a written consent of the Menteri Besar had been or was ever in the process of being obtained. The fact is, as found by this court, the whole transaction for the sale to SPPKB, never came to that since the purchase price was never fully paid. How could SPPKB describe itself as a vendor of the said land in its agreements with the plaintiffs, when in fact they have never acquired any title in it? Interestingly, Nam Bee was described as a principal vendor in those agreements. Nobody gave evidence as to what this means. Also, the so called principal vendor was not a signatory to the agreements. In my view it is indeed misleading for SPPKB to describe itself as one having acquired (presumably with a valid title) the said land from Nam Bee. The said agreements also never mention the obligation by SPPKB as the vendor, to apply for the written consent of the Menteri Besar for the sale of the said land.

[19] Secondly, there was the constraint under s. 214 of the National Land Code, which was never addressed by the agreements between SPPKB and the sub-purchasers. The said land, all over 3000 acres of it was actually a rubber estate called Nam Bee Rubber Estate. It is therefore estate land which for any fragmentation, required the approval of the Estate Land Board. Section 214A NLC states that:

> (1) Notwithstanding anything contained in this Act, no estate land is capable of being transferred, conveyed or disposed of in any manner whatsoever ... unless approval of such transfer, conveyance or disposal has first been obtained from the Estate Land Board (hereinafter referred to as "the Board") established under subsection (3).
>
> (2) The Register shall not register any instrument of transfer of such land under Part Eighteen of this Act unless such instrument is accompanied by a certificate of approval granted by the Board.

[20] It is clear from this section that statute forbids the fragmentation of estates into smaller plots of land without the approval of the Estate Land Board. Learned counsel for the plaintiffs had argued that s. 214A does not actually prohibit the making of contractual agreements involving fragmentation of estates. All that section requires is for the Estate Land Board's approval before registration can be effected into the names of individual purchasers. Thus, a transfer made in such an instance and without approval can be impugned. Both sides had referred to the following cases:

1. *Kumpulan Sua Betong Sdn Bhd v. Ezan Sdn Bhd & Anor* [1993] 2 MLJ 289
2. *UMBC Bhd & Anor v. Pemungut Hasil Tanah Kota Tinggi* [1984] 2 CLJ 146; [1984] 1 CLJ (Rep) 51
3. *Batu Kawan v. Pentadbir Tanah Daerah Seberang Prai Selatan* [2002] 1 CLJ 633
4. *Rengamah a/p Rengasamy v. Tai Yoke Lai* [1998] 1 CLJ 987.

[21] Learned counsel for D5 had submitted that the agreements must be void since they are designed to circumvent the prohibition under s. 214A NLC. The Federal Court case of *Kumpulan Sua Betong Sdn Bhd v. Ezan Sdn Bhd & Anor* [1993] 3 CLJ 337 was cited in support. Learned plaintiffs' counsel replied that s. 214A

NLC does not prohibit such contractual agreements of sale but agreed that such sales, before they can be registered in the individual names of buyers, must have the consent of the Estate Land Board. Learned counsel also referred to *Rengamah a/p Rengasamy v. Tai Yoke Lai* [1998] 1 CLJ 987, where it was held that such an agreement, being a conditional agreement, was therefore not illegal and could only be declared null and void if the Estate Land Board refused approval of the sale of the land.

[22] In my view, a sale of part of an estate land purporting to transfer the land for the completion of such sale, would be initially voidable at the instance of the consent of the Estate Land Board. In this case however, there was neither no mention of that legal requirement in the agreements, or agreed upon by the parties as a pre-condition to the agreements, nor was any evidence shown that steps had been taken to acquire that statutory consent, post agreements. In *Rengamah*, there existed in cl. 3 of the agreement, a reference to the date of receipt of the approval of the Estate Land Board, that date being agreed as the completion date. As such, the court held that the agreement in that case does not conflict with s. 214A NLC. Similarly, in *Kumpulan Sua Betong*, the parties had agreed that they would apply to the Estate Land Board for the approval of the sale. Furthermore, the agreement for the sale in that case was not caught by the fragmentation prohibition under s. 214A(1), since it was not sold to 'two or more persons'. In both those cases therefore, the parties had adverted to the statutory requirement under s. 214A and were aware of the need of that legal consent of the Estate Land Board.

[23] In the light of that background, there is, in my view, merit in the submission of learned counsel of D5 that the parties had in entering these agreements, attempted to discard the said legal requirement. As such, it must be held to be void as it could be interpreted as an agreement whose object is unlawful. Section 24 of the Contract Act 1950 prohibits such agreements. It states:

> The consideration or object of an agreement is lawful, unless:
>
> (b) it is of such a nature that, if permitted, it would defeat any law;
>
> – Every agreement of which the object or consideration is unlawful is void.

[24] The agreements for the sale of plots of land in this case will certainly result in the fragmentation of the estate, which is forbidden under s. 214A NLC. The absence of any clause or other collateral agreements by the parties to make those agreements subject to the consent of the Estate Land Board can thus bring this court to assume that an unlawful object was being pursued under those agreements.

[25] The plaintiffs attempted to prove the existence of a nexus between Nam Bee and SPPKB by adducing a purported agreement between these parties, initially marked as ID 45. D1 had objected to its admissibility and the court agreed to hear arguments on its admissibility (see p. 113 NOE). However at p. 118 NOE, this court had marked that agreement as P45. No reference was made to the earlier note that a submission on the question of admissibility would be heard. Nor was there noted that the objection on its admissibility had been withdrawn. Counsel for the plaintiff in his submission said that since it has been marked as an exhibit, the matter could no longer be relitigated. Be that as it may, D1 in his submission maintained his objection in spite of its marking as P45, saying that this court may reverse its ruling on admissibility (refers to *PP v. Ng Lai Huat* [1990] 1 CLJ 1190; [1990] 2 CLJ (Rep) 774). It was submitted by D1 that P45 cannot be admitted, even with consent of the parties, since the maker was not called. The main thrust of the objection on P45's admissibility rested on the fact that that document was not stamped as required under s. 52(1) Stamp Act 1949 which prohibited any instrument not duly stamped from being admitted as evidence in a civil case. I agree with this view and would hold that P45 could not be considered as evidence on the ground of its inadmissibility.

[26] In *Goh Beng Seng v. Dol bin Dollah* [1970] 2 MLJ 95, Sharma J said this:

> It is the duty of the Court to disallow all admissible evidence, even though no objection is taken to its admissibility. Inadmissible evidence remains inadmissible. It cannot be rendered admissible by failure of counsel to object to it.

[27] I also accept the alternative submission by D1 who had said that P45 even if admissible, should not given any weight because it was produced by surprise under re-examination of SP8, there was no signatory on behalf of Nam Bee and no common seal of Nam Bee was used to execute that agreement. Also in P45 there

was a reference to a previous agreement dated 5 December 1979, which was never produced. There were also contradictions within P45 itself as to what date it was executed. And lastly there was no acknowledgment in P45 that a full purchase price had been paid.

The Alternative Submission

[28] As an alternative to the main thrust of his submission, learned counsel for the plaintiffs had argued that the plaintiffs, as the sub-purchasers had rights to the said land from the fact that D1 acted as their trustee in purchasing the said land.

[29] It is now necessary to continue with the narration of the facts leading to this assertion. In September 1992, the Receivers and Managers (R & M) of D3 who were appointed by D5, had advertised in the Star newspaper that the said land was to be auctioned on 8 September 1992. A group of 3 or 4 sub-purchasers (including SD7, one Tan Tang Seong) members of the protem committee purportedly representing the sub-purchasers approached D1, who after assessing the situation decided to personally made a bid for the said land. According to D1, he was moved by the pitiful condition and situation of the plaintiffs. D1 however admitted that the situation was also an opportunity for him to own some land. On the advertisement for the auction, the name of one Mr. Suppiah acting for Ernest & Young (the R & M) appeared. Suppiah (SP13) was known to D1, since the latter had been a solicitor in a matter involving his family. Together with SD7 who came to meet D1 was his uncle one Tan Gim Guan who together with his family had a large interest in the said land and was anxious about the impending auction. D1 contacted Suppiah (SP13) and was informed about the problems with the land. SP13 later met up with D1 and related to D1 the background to the land and the sub-purchasers who were deemed as squatters by D5 since they had no agreements with SEP (D3) who had since charged the land. D1 told the members of the protem committee that he would get the details in respect of the auction from SP13. D1 denied that the protem committee had ever appointed him as their solicitor but admitted that he was consulted on the matter. After inspecting the related documents, a few days later D1 informed the protem committee that the auction could not be stopped. D1 also informed them that D5 had no knowledge or interest in the agreements the sub-purchasers

had with SPPKB. The sub-purchasers had then organised a meeting on 30 August 1992 at Simpang Empat Plantation and SD7, (the nephew Tan) requested D1 to be present at that meeting, which D1 did. At the meeting D1 met Muniandy (SP14) for the first time. D1 had mostly spoken to SD7 and SP14 as they were English speaking and found that it was easier to deal with them. There were some 150 people at that meeting. D1 brought along his clerk (SD10) to the meeting. The so-called meeting was not really a proper meeting but, according to SD10, merely a grouping that had gathered to enquire from D1 of their interest in the land in view of the auction. SD10 in his testimony also stated that D1 had not told the people there that he was representing them. D1 suggested that they meet Renganathan (SP8) who was then at his office. According to D1 the people there were then angry with SP8, on the prospect of losing their land. When met, SP8 had confidently assured them that he had made an arrangement with the help of a friend, one Raymond Taylor to pay off the outstanding sum to MBf. SP8 then showed D1 a cheque for RM3.5 million dated 27 August 1992 and paid to SP8. The photocopy of the cheque (exh. D15) was obtained by D1 from SP8. SP8 also assured them that the sale by tender set on 8 September 1992 would not take place. SP8 also proposed that SEP would hold an annual general meeting so that fresh sale and purchase agreements would be entered with the sub-purchasers in substitution with their agreements with SPPKB, and that upon payments of the full purchase price the sub-purchasers will be given their portions in the said land. D1 stated in his evidence that he had never told the people who had gathered there that he was their lawyer or had told them that he would do anything to stop the auction. The court accepts this as a true version and D1's explanation that he had no power to stop the auction. There was also no warrant to act, or that any fees or disbursements were given to D1, although he had admitted that he did act for some sub-purchasers to enter into private caveats for them and that he wrote letters to the R & M and the Registrar of Titles.

[30] A few days before the auction date the two Tans came to see D1 and they told him that there was no settlement with MBf. D1 was also informed that the auction was to take place as scheduled. The Tans told D1 that they were in no position to make a bid but would be happy if someone else bought the land and would give back the portions to the sub-purchasers who had fully paid up their dues under their agreements with SPPKB. D1

A then consulted a few friends who agreed to raise the 10% payable by 8 September 1992 according to the terms of the auction. The members of the protem committee were happy with this new development. D1 and SP13 then went to inspect the said land. He found part of it covered with jungle and part of it already
B cleared but not yet cultivated. D1 stated that at no time was he appointed or instructed to make the bid on behalf of the sub-purchasers. He explained that the balance purchase then stood at RM 3.6 million and it would be too risky for him to bid on behalf of others as this would virtually invite bankruptcy. On
C 8 September 1992 D1 made his bid (see exh. D67) and paid by the cheque the 10% deposit (see D68). On 14 September 1992, D1 wrote a letter (see D69) to the R & M stating the pathetic plight of the sub-purchasers and that he intended to enter into fresh agreements with them. He copied this letter to D5 and to
D SP14 (Muniandy) who was by then Chairman of the protem committee, who acknowledged it. On 5 October 1992, D1 wrote another letter to the R & M (see D70) intimating that he was making a bid for the said land and if successful would enter fresh agreements with all the (741) sub-purchasers. D70 clearly shows
E that the tender was made personally by D1 in his name. D70, essentially repeated D1's intention to make his bid as expressed in his earlier letter at D69. In my view these letters also corroborate his evidence that he was making the bid in the interest of good conscience and to help the plight of the sub-
F purchasers. D1's bid to purchase the said land was the only bid received by R & M. The sale could not however proceed because by then Renganathan had obtained an injunction to prohibit the acceptance of D1's bid. That injunction was set aside in 1993 but D1 was informed by Dato' Robert Lim (SD12) a partner of
G Ernest & Young ie, the R & M that the debt to MBf Finance Bhd (D5) had by then increased and that a new tender would be offered. The deposit paid by D1 was refunded by the R & M.

[31] After the abortment of the first auction, the R & M
H advertised for a second auction. The R & M sent D1 another tender form to participate since D1 was the only bidder for the aborted first auction. D1 was initially not interested because, according to him, he had been hurt by some adverse remarks made against him in that whole affair. Towards the end of January
I 1994, Mr. Vellasamy, the first plaintiff who was then the Chairman of the protem committee and a few others including the Tans approached D1 and persuaded him to make a second bid and

undertook that they would enter into fresh sale and purchase agreements with D1 if his bid was successful. D1 agreed to do so on his terms which he put in writing (see letter dated 29 January 1994 ie, exh. D71) which was prepared in the presence of first plaintiff and the Tans. D1 thought of bidding at a price of RM4.1 million. Another meeting was held with the sub-purchasers at Simpang Empat where D1 explained to them why he was making the second bid on condition that the sub-purchasers show their interest to buy back their plots.

[32] Exhibit D72 is the so-called minutes of what transpired at that meeting, recorded by SD2. D1 told the sub-purchasers to pay their balance due under their agreements with SPPKB within four months as that would be the time limited for payment if his bid was successful. D1 also explained that since the said land was estate land and if no approval was given, he would form a company and have the said land transferred to that company with the sub-purchasers entering into new agreements to hold shares in that company. He also told them that they would lose their plots if they failed to enter into these fresh agreements with him. D1 also explained to the meeting that it was not possible to share the bid price because the sub-purchasers had paid a varied sums to SPPKB, some at 5% to 10%, some almost the full purchase price, while there were others who had paid only a deposit citing the case of one Mr. Vadiveloo (now deceased), a fellow lawyer, who had merely paid a booking fee of RM4,500 for his ten lots of 30 acres. On 4 February 1994 D1 made a bid for the said land at RM4.5 million. Two of his friends who participated with him in the first bid joined him in the second bid. Dato' Robert Lim then called D1 and asked him to up his bid to RM4.85, which D1 agreed. D1 stated that in making the bid he did not consult or obtain the consent of the protem committee since it was his personal bid. At a subsequent meeting with the sub-purchasers on 30 January 1994 D1 explained that he was not appointed by the protem committee to make the bid. The R & M on 7 March 1994 informed D1 that his bid was successful. D1 had informed the R & M and D5 that if successful he would enter into fresh SPA with the sub-purchasers. This was done (see exh. D73).

[33] D1 then wrote to all known sub-purchasers according to the list in P42 which was later found to be incorrect. There were 741 names on that list but it was found that payments and balances were incorrect. Some 150 people responded to D1's notification. A gathering of the sub-purchasers was called for on 3rd and 4th

April 1994. The names of 217 attendees were kept. These persons are now the other unnamed plaintiffs in this action. The meeting became unruly and D1 was advised to call it off. D1 in his evidence also stated that at this meeting he had virtually pleaded to the sub-purchasers to take back their plots as they would stand to lose them and also their lifetime savings. This piece of evidence was not disputed by the plaintiffs and I accepted this as proof of good faith on the part of D1. D1 then again on 17 March 1994 wrote to the sub-purchasers (see exh. D74) asking them to produce an original stamped copy of their agreements and advising them to enter into fresh sale and purchase agreements with him and pay up the balance by 3 April 1994. Around this time SP13 approached D1 and demanded a commission of 40% share in the property or RM1.4 million. SP13 was by then no longer working with Ernest & Young. D1 denied that he had made such an offer to SP13 since SP13 was then merely doing his job as an employee of the R & M. D1 refused to entertain SP13's demand.

[34] D1 had by then paid a deposit of RM485,000 to the R & M. A sum of RM276,450 was paid by some of the sub-purchasers. D1 arranged for loans from several banks to pay for the balance. By then his relationship with some of the sub-purchasers had fallen out. They had entered a registrar's caveat and a few private caveats on the said land. There was a dispute between some members of the committee with D1 on whether they actually participated in sharing in the bid price and that the bid price was RM4.01 million and not RM4.85 million. The other area of contention was that the sub-purchasers were not willing to take proportionately the land still under jungle. Some sub-purchasers had retained a solicitor who wrote to D1 asking him to pay RM2,500 per acre for their plots, to which D1 disagreed. A total of 43 sub-purchasers had by then entered into fresh SPA with D1. At another meeting with a few sub-purchasers led by the late Mr. Vadiveloo, the lawyer, it was agreed that an extension date for the payment be given. D1 agreed to extend till 2 May 1994, and felt that it should be extended to all listed in P42. He then wrote a letter to that effect to all known sub-purchasers (see D85). There were continued negotiations with members of the protem committee after that and by agreement, D1 again extended that payment date to 20 June 1994 (see D91). Eventually 39 out of the 43 sub-purchasers who entered fresh SPA with D1

managed to sell of their plots at RM8,000 per acre. The other four asked for RM16,000 per acre and ultimately managed to sell of their plots at that price (see p. 393 NOE).

[35] According to D1, Mr. Balakrishnan, the second plaintiff had also seen him before and after this suit was filed. He confessed to D1 that he had been misled in not entering into the fresh SPA with D1. The second plaintiff's solicitor then, Mr. Karpal Singh also spoke to D1 to get his client's land sold off, but it turned out that the purchasers to the other plots would only consider purchasing at the market price. This evidence against the second plaintiff remained uncontradicted since the second plaintiff himself had not given any evidence. This court accepted this evidence as showing the confused state of mind of the second plaintiff at that material time; and an example of the uncertainty of the sub-purchasers in respect of their positions on the plots they had agreed to buy from SPPKB.

[36] With the registrar's caveat on the title the bank loans sought by D1 failed. However a week before 30 July 1994 dateline, D1 managed to sell the remaining balance of 3321 acres (ie, minus the 360 acreas already sold by the 39 sub-purchasers). Even after that, D1 contiued to receive letters from the sub-purchasers offering to buy back their land after the expiry of the offer period (eg, p. 297 of AB1) to which D1 replied (*vide* exh. D94) that he was no longer in a position to accede to that request. In my view, D94 is a telling piece of evidence to show the exasperation of D1 in trying to help the sub-purchasers to retain their plots.

[37] Meanwhile the office of the Pengarah Tanah and Galian wrote to the R & M (see D154) and also to D4, upon a query by the R & M (see D155) informing them that in a force-sale situation such as a public auction by the R & M in the instance case, the restriction in interest requiring the Menteri Besar's consent for a transfer, was not necessary (see evidence of SD13, ie, the Deputy Registrar of Titles at p. 808, *et seq* of the NOE). Under cross examination of SD13, learned counsel had attempted to impute that SD13 was working hand in glove or had a 'private dealing' with D1, but I found no evidence of such collusion or the veiled allegation that SD13 was directed by D1 to remove the registrar's caveat. That registrar caveat, according to SD13, was removed because there was no court order for its extension, and that there was no government's interest involved to allow it to remain. The said land was subsequently duly registered to D4

(Regal). The mirror principle of the register and s. 340 of the National Land Code on the indefeasibility of that title thus becomes applicable.

[38] The cross-examination of D1 stretched from pp. 394 to 549 of the NOE. There were no contradictions in his evidence in spite of the lengthy cross examination which took 14 days to complete. Here I am reminded of what Lord Wright said in *Vassiliades v. R* [1945] PC:

> … but the Judge has always a discretion as to how far it (cross-examination) may go or how long it may continue.

[39] And particularly so in this instance where the cross examination of D1 requires considerable tact and patience. Thus the need for me to exercise a fair and reasonable discretion in allowing a greater latitude to plaintiff's counsel. This is no surprise since D1 is an advocate who by then had 18 years of active practice, both at the civil and criminal bar. In spite of the gruelling cross examination I must commend learned counsel for the plaintiffs who had the misfortune of having to question a fellow member of the Bar. It must have been disquieting but Mr. Vijandran undertook that demanding task in a highly professional manner and was absolutely polite to his adversary in the witness box, conscious, I believe, that the dignity of the Bar was also at stake in this trial. Although there was an application by learned counsel for the plaintiffs to cross examine D1 after the co-defendants had completed their cross examination, on the ground that there was a community of interest amongst the defendants, this court had ruled that the plaintiffs should cross examine first, followed by the co-defendants. This order for cross examination was so ruled following the common practice under s. 138 of the Evidence Act. The court could not say at that point that the defendants were not in adverse positions.

[40] During his cross examination D1 was referred to four letters written by his firm, D2 where it was mentioned that D2 acted for either the committee or the sub-purchasers in writing those letters (see D69, D70, D111 and D128). His explanation on these letters which this court accepts, is found at p. 415 NOE and D1 said:

> J: I did as a solicitor write letters stating that I was acting for sometimes the committee as sometimes for sub-purchasers but I wrote those letters at the request of the committee or some members of the committee but not whilst I was appointed by individual members of the committee.

> While writing the letters I acted as their lawyer and conducted myself as a lawyer insofar as writing those letters. Yes I represented myself as their solicitor only insofar as I wrote their letters as well as when I was consulted on their problems, I did give legal advice. Yes, particularly the first time when the first group came to see me.

[41] And at p. 555 of NOE, D1 stated this:

> My role with the Protem Committee – when the members of that P.C. first saw me sometime towards end of August 1992, they did see me as a solicitor and consulted me with a view to stop the scheduled auction on 8.9.1992. I did write letters subsequently but I was never at any time engaged by the P.C. to act as a solicitor with regard to making any of the 2 bids.
>
> As regards my role with the sub-purchasers, none of them engaged me except some of the sub-purchasers and the members of the P.C. for the purpose of entering private caveats.
>
> When I use the words 'my clients' or 'our clients' in various letters, I had used those words to mean that I was writing those letters for and on behalf of the members of the P.C., but I never meant that I was acting or writing on behalf of the sub-purchasers. I may have used those words loosely.

[42] D1 however admitted that he did act for some of the sub-purchasers to enter private caveats for them (see p. 432 *et. seq.* NOE). D1 however stated that in his meeting with Dato' Robert Lim (SD12) of the R & M on 2 October 1992 he had told SD12 in no uncertain terms that he made the bid for the said land for himself and not on behalf of the sub-purchasers. SD12 in his evidence had confirmed that the bid was made by D1 in his own name for both tenders (see p. 768, 794 and 795 NOE). SD12 also confirmed that D1 had met up with him to inform him that he (D1) was making the bid personally (see 796 NOE). During cross examination by plaintiffs' counsel SD12 was referred to a letter (see P82 and D110) in which it was stated that D1 was making the bid on behalf of the 741 sub-purchasers. This letter dated 28 September 1992 was written by the R & M to D2. Under cross examination by D1, SD12 agreed that whoever drafted that letter for the R & M could have been mistaken that D1 was making the bid on behalf of the sub-purchasers, especially so, said SD12 after seeing all the other letters (see pp. 798 and 799 NOE). SD12 also stated in his evidence that as the R & M, he acted independently and was accountable and report to the Registrar of Companies. He did not take any directions from SEP

A or colluded with D1 to defraud the sub-purchasers. His main responsibility was in the due conduct of the receivership. SD12 came out as a truthful and independent witness, and his version was accepted by this court. His evidence corroborated D1's assertion that the bids were made by D1 personally and not on
B behalf of the sub-purchasers. According to SD12 the sub-purchasers in the eyes of the R & M were actually squatters.

[43] A good part of D1's cross examination by learned counsel for the plaintiff centred on D1's role in acting as the solicitor for
C the sub-purchasers in making the bids for the said land. After due consideration of the total evidence of D1, and taking into account the related documents it is this court's finding that the bids on both the tenders for the said land were made by D1 personally and for his own advantage, although by his own admission D1 did
D act as a solicitor for some of the sub-purchasers but this did not directly pertain to making those bids.

[44] In his evidence D1 also said that he now knew that D5 were innocent chargees and had no notice of the agreements between the sub-purchasers and SPPKB (see pp. 306, 368, 440,
E 442 and 552 NOE) although in an earlier statutory declaration, based on information he derived from the committee members, he had stated that D5 had such knowledge. The court accepted this evidence and makes a finding of fact that D5 were actually innocent chargees without notice of the sub-purchasers' interest in
F the said land.

[45] The evidence of the other defence witnesses, in the main, supported and corroborated the testimony of D1. This court did not find any contradictions or discrepancies in their evidence with
G that of D1.

[46] The plaintiffs in this alternate submission claimed that D1 had been their solicitor and that in consequence, a fiduciary relationship had been created. My finding of the facts derived from
H the plaintiffs' case did not however support this contention.

[47] SP4 said she had authorised the fourth plaintiff to file this suit. She also said that she had never appointed D1 or D2 as her lawyer. SP6, an officer from the Registrar of Title's office
I testified that the said land was never registered in the name of SPPKB. SP9 was one of the sub-purchasers who brought a civil action in the Teluk Intan Magistrate Court, against SPPKB and succeeded in obtaining a refund of the moneys he had paid to

SPPKB. He stated that he did not personally appoint D1 as his lawyer but it was the committee who appointed him. He also said that D1 had told the sub-purchasers not to be afraid and that he will represent them. D1 denied ever uttering that. SP11, testified that he attended the meeting on 30 August 1992. There, he saw D1 who said that he had come as a lawyer and told the sub-purchasers not to worry. Later, after meeting with SP8 in the office, D1 had shown them a cheque for RM3.5 million. D1 also told them that SP8 had given an assurance that the sale of the said land will not go on. Under cross examination however, SP11 admitted he knew nothing about the first bid (see p. 187 NOE). It is my finding that what actually transpired at both the meetings was as recorded in the minutes at D72, D78 and D80. It is not safe for this court to accept the allegations made by SP11 which under cross examination were found to be doubtful and contrary to some contemporaneous documents. SP14, Muniandy in his evidence stated that D1 at the meeting on 30 August 1992 spoke to some sub-purchasers outside SP8's office and agreed to be their lawyer (see p. 264 NOE). SP14 claimed that he was the Chairman of the protem committee from 15 August 1992 till October 1992. I find his allegation on D1's role to be in contradiction with the evidence of defence witnesses and the documents as already adverted to earlier in this judgment. That claim was also opposed to the evidence of some of the plaintiffs' witnesses and documents, in particular exh. D71, where no such mention was made of D1 representing the sub-purchasers. D71 was made for the second bid, and SP14 acknowledged receiving this letter. Under cross examination SP14 did not surface as an open and truthful witness. This court choose to reject SP14's allegation that D1 had acted as the sub-purchasers' lawyer in view of the contradictions.

[48] In *Mewah Plus Property S. B. v Kluang District Government Servants Co-Op Housing Society Ltd.* [2000] 2 AMR 1433, the Court of Appeal through the judgment of Gopal Sri Ram JCA said:

> In our judgment, a trial judge is entitled to accept evidence adduced by one party in preference to another party. And no duty is cast upon a trial judge to give reasons for his preference especially in a case which turns upon opinion evidence

and dismissed the submission of counsel for the appellant who said that the trial judge was wrong to have preferred the evidence of the respondent without giving reasons for his choice.

A **[49]** In my view, there was a misconception amongst some of the sub-purchasers that D1 was acting on their behalf and as their lawyer. SP12's evidence (p. 212 NOE) in stating "we always thought that Mr. Bachan was our lawyer" was a reflection of this mistaken impression.

B

[50] SP13, Suppiah was the officer appointed by the R & M to handle the tender. He had direct communication and had worked closely with D1 in the tender exercise. SP13 did not say in his evidence that D1 had acted for the sub-purchasers in making the C bid. On the contrary he had testified that D1 had made the bid in his personal capacity (see pp. 236 and 242 NOE), although he did say that the sub-purchasers had given D1 his blessing (see p. 243 NOE). SP13's relationship with D1 fell out in view of the allegation that SP13 had asked for a commission from D1 and D that the latter had refused to entertain his demand. SP13's evidence in view of that acrimony is found by this court to be tainted in parts. As such, this court must be cautious in assessing the probity of certain parts of his evidence.

E **[51]** Learned counsel for the plaintiff in his submission referred to P82, a letter written by the R & M to D1 and dated 28 September 1992, where the R & M had referred to D1's letter to them, dated 14 September 1992 (ie, D69) in which it was said that the bid was made by D1 on behalf of the 741 sub-F purchasers. SP13 explained that he had drafted P82 using D1's letter as a basis. SP13 however admitted his mistake when he pointed out under cross examination (see p. 242 NOE) that nowhere in D1's 14 September 1992 letter was there a mention that the bid was made on behalf of the sub-purchasers. All D69 G said was that the bid was made by D1 with the blessing of the sub-purchasers. This court rejects learned plaintiffs' counsel submission that this letter, P82, illustrated the collusion between the first three defendants. Also, SD12 in his evidence had stated that D1 had met up with him and told him that he (D1) was H making the bid personally (see p. 796 NOE). SD12 also emphatically denied that there was any collusion between the R & M and D1. SD12 further explained that looking at all the other correspondence, P82 was a genuine mistake. He too agreed that D69 did not say that D1 was representing or acting on behalf of I the sub-purchasers (see p. 798 NOE). This court accepted that explanation.

[52] SD7, Tan Tang Seong was a member of the protem committee and had dealt with D1 throughout and knew in detail the dealings on both tenders. Learned counsel for the plaintiffs had urged this court to invoke the adverse inference under s. 114(g) Evidence Act against D1 for his failure to call the elder Tan who was the actual substantial purchaser. This court could see no reason for applying that adverse inference. In my view SD7's evidence was sufficient in narrating the actual events. In *Munusamy v. PP* [1987] 1 MLJ 492 the Supreme Court held that:

> Adverse inference under that illustration can only be drawn if there is withholding or suppression of evidence and not merely on account of failure to obtain evidence. It may be drawn from withholding not just any document, but a material document by a party in his possession nor for non-production of just any witness but only an important and material witness to the case.

[53] D1 had also explained, which this court accepts, that the elder Tan besides having been dragged to this court for contempt and given a warning, (see pp. 751-754 NOE), had also made a demand of RM50,000 from D1 to appear as a witness. D1 submitted that it was a risk for him to call the elder Tan as a witness. I agree. SD7 also stated that at their meeting with SP8 on 30 August 1992, D1 never represented himself as the sub-purchasers' lawyer. SD7 also stated that on that date, 30 August 1992, SP14 was not even a member of the protem committee and that in the 5 or 6 meetings held by the protem committee prior to the first auction date of 8 September 1992, SP14 never attended any of those meetings. This demolished SP14's claim that he was then its Chairman. This was another example of why this court had warned itself on the danger of accepting all of SP14's testimony, due to his lack of credibility.

[54] Learned counsel for the plaintiffs had submitted that once a solicitor-client relationship is established, there arises a fiduciary relationship. And if a conflict arises between a duty to himself and that of his clients, that solicitor becomes a trustee for any and all benefits arising from his dealing with the property. In the instant case he submitted that D1 had become a trustee for the sub-purchasers over the said land that he had bought in his name. Learned counsel also submitted that in view of D1's dominance over his clients and the trust they repose in him, D1 could not avail himself of the defence that what he did was in the interest of the sub-purchasers or that he sympathised with their plight. It was also submitted that D1 had placed himself in a position of

A conflict of interest and that that relationship implied undue influence, citing a number of English authorities. Learned counsel further submitted that D1 could have had negotiated a better deal for the purchasers then the one he (D1) had offered them, but instead gave priority to his (D1) own personal agenda to make a B profit for himself. D1 answered this by saying that if profit was his only motive then he could have sold the said land earlier to SP8 who had offered him RM10 million as the purchase price. He however did not sell as he had the interest of the sub-purchasers at hand.

C

[55] This court's duty is not to make a moral judgment but to address the issues according to its background facts in determining whether the plaintiffs are entitled to the remedies sought. My findings on whether the plaintiffs have succeeded in their claims D must not therefore be clouded with the ethical issues which I may add, was brought up in the plaintiff's submission not without any basis in that D1 had stumbled upon this opportunity to buy land and admitted that he took that opportunity. It must be reiterated that the facts do not show that a solicitor-client relationship E existed between D1 and the plaintiffs; thus no fiduciary duty arises. The evidence does not show such a contract between the plaintiffs and D1 or D2, and this court will not make a contract for the parties and certainly not in this case (see *Lim Nyuk Chan v. Wong Sz Tsin* [1964] 1 MLJ 200). Next I would also hold that F the evidence had not proven that D1 had manipulated the situation and had been overbearing or exercised undue influence on the plaintiffs. On the contrary I find that D1 had been open and transparent in his dealings with them. The bid made by D1 was made in his personal name and not on behalf of the sub-G purchasers and there was overwhelming evidence to support this finding.

[56] It is the finding of this court that the agreements for the purchase of the said land were actually for the holding of shares in SPPKB, although some of the agreements were for plots of H land. The said land was operated by SPPKB as an estate, thus, the clause found in the agreements that payments for the land plots were deductible from the profits of the produce of the estate (oil palm). SPPKB on the other hand never held the said land and were not, at any time, its registered owner. The actual I owners of the land were SEP who in my view, also has a locus to file this suit, but did not. Even SPPKB of which the plaintiffs had shares in did not sue. It is trite that shareholders have no

property, legal or equitable, in the assets of the company. I do not agree with the stand taken by plaintiffs' counsel that this court should peep behind the corporate veil in determining the interest of the plaintiffs in this case. The distinct corporate personality of the company should remain intact (see *D & C Bank Bhd v. Lam Chuan Coy & Anor* [1989] 1 MLJ 318). The plaintiffs could not therefore be declared as either having equitable or beneficial interests in the said land. The said land was sold to D1 by way of a public auction undertaken by D5, who had an indefeasible charge over the said land.

[57] The public auction was known to the plaintiffs and was authorised by the R & M by virtue of their appointment under cl. 22 of the debenture dated 12 March 1991, entered into by D3 and D5 (exh. D134). The R & M had conducted their investigations and was satisfied that the assets of D3 were in order. Clause 23 of the said debenture authorised the R & M to sell the said land to recover any outstanding debts to D5 which the directors of D3 had failed to pay. The R & M after effectively taking over D3's operations had written to Rengganathan (SP8) asking him to submit the statement of affairs of D3. There was no reply from SP8. This court is satisfied from the explanation of SD12 that the R & M had undertaken its legal obligations to realise D3's assets by selling off the said land. The duty of the R & M, as agents for D3 includes the disposal of assets. The R & M are not the agents of the directors of D3. In the case of *Melantrans Sdn Bhd v. Carah Enterprise SB (in receivership) & Anor* [2000] 3 CLJ 127, a case discussing the powers and functions of a receiver and manager appointed under a debenture, it was held by the Court of Appeal that a receiver and manager had the unfettered power to sell land pursuant to the document of security, (in this instance, the debenture dated 12 March 1991). This power of sale is not subjected to a sale governed by the procedure under the National Land Code, distinguishing the features in *Kimlin Housing Development Sdn Bhd (in liquidation) v. Bank Bumiputra (M) Bhd & Ors* [1997] 3 CLJ 274, by stating that:

(a) in the *Kimlin* case, the chargor company was wound-up and consequently, the receivers and managers ceased to be agents of the chargor company;

(b) in the present case, the chargor was not wound-up;

A (c) the debenture under consideration here empowers a receiver and manager appointed under the debenture to act as agent of the first respondent, in the exercise of the powers accorded to the receiver and manager under the debenture;

B (d) the debenture under consideration here contains a validly constituted power of attorney clause, irrevocably appointing the receiver and manager the lawful attorney of the first respondent;

C (e) the provisions of the Code deal with the powers of a chargee to sell land charged under the Code so that any receiver and manager appointed by the creditor of the charged property must conform to the Code.

[58] As such the R & M, as here, may proceed to sell by way of tender, as was duly done. The Court of Appeal also held that:

D

> Although sub-s (3) of s. 183 of the Companies Act 1965 gives the power to a receiver and manager of the property of a company to apply to the court for directions in relation to any matter arising in connection with the performance of his functions, this is merely discretionary and it was our considered opinion that
E the borrower company here need not even apply to the court for their receiver and manager to sell the lease of the said land to the appellant.

[59] Learned counsel of D3 in his submission also took the stand,
F with which this court agrees, that there was nothing in the registered title of the said land to indicate that the plaintiffs had any interest in the said land. He also submitted that the tender submitted by D1 was made by the latter in his own personal capacity and that the R & M for D3 had entered into a sales and
G purchase agreement with him in that capacity, with the R & M acting as agents for D3. In his evidence SD12 stated that:

> At the second sale only one tender was opened. I or any of the R & M did not conspire with Gurbachan Singh to defraud any of the purchasers. Gurbachan Singh did not offer any benefits or
H gains to any of the R & M.
>
> On the first tender, the bid was made by Gurbachan in his own name. For the 2nd tender, I believe also in his own name.
>
> Rujuk ms 147 – AB.1.
>
I
> Yes this is the advertisement for the 2nd tender.
>
> Rujuk ms 180 AB.1.

This letter to E & Y was signed by Gurbachan Singh and acknowledged by me as R & M. The bid was made by Gurbachan Singh in his own name. I did not enquire if he was a nominee for anyone. We were interested to sell.

And under cross-examination, he reiterated:

Rujuk D. 81 – Form of Tender

Yes this is the bid for the 2nd tender with the Form.

I confirm that 2nd tender was also by Encik Bachan personally.

[60] I also accept the submission by D3's counsel that D3 had not conspired with either D1 or D2 to defraud the plaintiffs. This court also found on the facts, that there was no evidence of fraud on the part of these three parties. Such an allegation needs in law to be proven by the plaintiffs beyond a reasonable doubt (see *Tai Lee Finance Co. SB v. Official Assignee & Ors* [1983] 1 CLJ 183; [1983] CLJ (Rep) 387).

[61] In *Ang Hiok Seng v. Yim Yut Kiu* [1997] 1 CLJ 497 it was held by the Federal Court that:

Whether the allegation of fraud in civil proceedings concerns criminal fraud such as conspiring to defraud, misappropriation of money or criminal breach of trust, it is settled law that the burden of proof is the criminal standard of proof beyond reasonable doubt and not on the balance of probabilities. An allegation of criminal fraud in civil or criminal proceedings cannot be based merely on suspicion or speculation.

[62] And in *Datuk Jaginder Singh v. Tara Rajaratnam* [1983] 2 MLJ 194, the Federal Court then held that:

The two authorities clearly show that fraud must be actual. It must involve dishonesty of some sort. Thus fraud may occur where the designed object of a transfer is to cheat a person of an existing right or where by a deliberate and dishonest act a person is deprived of his existing right.

[63] None of this elements emerged in this trial and the plaintiffs had not proven their allegation of fraud on the parts of D1, D2 or D3.

[64] Learned counsel for D5, in response to plaintiff's counsel's submission that D5 had actual knowledge of the presence of the sub-purchasers on the said land had submitted that the allegation

of such knowledge was merely upon reliance of SP8's testimony who had stated that he (SP8) had brought SD17 (a manager of D5) for an inspection of the land prior to the processing of D3's loan application from D5. SP8 said that SD17 had seen the sub-purchasers and that he (SP8) told SD17 who they were. SD17 conversely said that 'I did not see anyone in the plantation.' There was no challenge on this fact. SD17 also said that SP8 did not tell him anything about the plantation. He was also not cross examined on this fact. I agree with learned counsel of D5's submission that there was no reason for SD17 to have lied. SD17 is now a lecturer at TAR College and no longer has any affiliation to D5 to tell a lie in its favour. In fact SD17 left D5 even before the loan was approved. Further, SP8's allegation that he informed SD17 of the existence of the sub-purchasers on the said land is also contradictory to contemporaneous documents ie, the valuation report (D7) and the application for loan (D20) which made no mention of the sub-purchasers. I found SP8 to be lying when he said that it was the valuer's idea not to mention about the sub-purchasers in the report since this would facilitate the loan approval. SP8 as earlier stated in this judgment is an unreliable witness. As such, faced with these two conflicting versions, this court chose to accept that of SD17. It is now my finding that the allegation made that D5 had actual knowledge of the presence of the sub-purchasers on the said land was mere conjecture, not founded on any factual basis. As such, D5 did not have any notice of the plaintiffs' alleged beneficial interest even if it had been proven that they had such an interest in the said land. That assertion is however, as was held earlier, not proven.

[65] In his submission, learned counsel for the plaintiffs also said that the charge to D5 was invalid because it was registered without the consent of the Menteri Besar. This issue was however never pleaded and should be summarily dismissed. That aside, this submission is also misconceived since the evidence shows that the charge (P12) under presentation No. 9755/91 carried with it an endorsement 'KMB' which I accept to mean 'Kebenaran Menteri Besar'. As for the transfer of the said land, which was done without the consent of the Menteri Besar, I agree with the stand taken by learned counsel of D5 that in this instance, such consent was not required. I also accept the explanation of SD13 on this issue that only in a voluntary sale situation is such consent required as a condition imposed on a proprietor (s. 5 NLC), but

not in the case of a forced sale by a receiver and manager or upon an order of the court or in a vesting order situation (see p. 830 NOE).

[66] Learned counsel for D4 in his submission also took the common stand with the other defendants that the plaintiffs had not proven their assertion that they had any beneficial interest in the said land and as such he concluded, the plaintiffs have no capacity to bring this suit against the defendants. This court for the reasons already given agree with this submission. As regards the submission by the plaintiffs' counsel that D4 was not a *bona fide* purchaser without notice, because D4 was an alter ego of D1 who in fact had notice of the plaintiffs beneficial interest, this court finds that firstly, the issue of D4 was not pleaded by the plaintiffs. Secondly, it is my finding that D1 never had notice of such beneficial interest possessed by the plaintiffs on the grounds already given above. The said land was purchased by way of a personal bid by D1 in a valid and proper public auction called by the R & M of D3. SD14, the co-executive director of D4 had testified that D4 had bought this land from D1. D1 had then informed SD14 that there were already 43 purchasers who had acquired 360 acres of the said land, leaving a balance of 3321 acres. SD14 had two other companies ie, Lien Hoe Xing Sdn. Bhd. and Jugra Palm Oil Sdn Bhd (Jugra) which bought shares in D4 equivalent to 1550 acres (see SPA dated 29.7.1994, D157). SD15, was the owner of Lien Hoe Xing, who together with Jugra had bought 1771 acres of the said land. These two companies had paid RM 4,649,400 for the purchase of those portions in the said land. SD15 was also a director of D4. It was not put to these two witnesses during their cross examinations that D4 had knowledge of any beneficial interest of the plaintiffs. In his evidence SD14 had stated that he visited the property before signing the SPA. He also said this:

> When we inspected the property there was no access road and we could not reach the site by car. The property was more or less abandoned. No one took care of it. The back portion was all jungle.

[67] SD14 stated that he had paid a fair price for the said land which he termed as 'secondary jungle'. In my view, there was nothing sinister or suspicious about the sale of the said land by D1 to D4. The evidence of both SD14 and SD15 shows that they were *bona fide* purchasers without notice of the said land.

A

Representative Action

[68] This suit is a representative action with the four named plaintiffs alleging that they are representing 213 other sub-purchasers. I had asked counsel for all parties to address the court on this point because a judgment in this action would bind everyone of the 213 persons represented by the four named plaintiffs. Order 15 r. 12 of the Rules of the High Court 1980 states that:

> (1) Where numerous persons have the same interest in any proceedings, not being such proceedings as are mentioned in rule 13, the proceedings may be begun, and, unless the Court otherwise orders, continued, by or against any one or more of them as representing all or as representing all except one or more of them.

[69] Order 15 r. 13 excludes from r. 12 any proceedings which concerns, *inter alia*, the construction of a written document. The appointment of a representative under r. 13 is however at the behest of the court, not as here where the action was begun purportedly as a representative action. The three criteria to satisfy r. 12 are common interest, common grievance and that the relief sought must be beneficial to all (see *Palmco Holding Bhd. v. Sakapp Commodities (M) SB & Ors* [1988] 2 MLJ 624 and *Tong Tai Holdings Sdn Bhd v. Jimi a/l Mantali & Ors* [2003] 6 CLJ 170). The defence took the stand that the 213 sub-purchasers represented by the four named plaintiffs are never identified in the evidence either by names or the plot numbers they held in the said land. It was also submitted that some of the agreements are for the sale of shares and some are for plots of land; thus there was no common interest. In a particular case, that of SP9, Puthuraja, he had obtained money judgment and had his agreement terminated. Thus he cannot be said to have a common interest with the others. P42 mentioned 565 sub-purchasers while the representation in this suit is only for 213 sub-purchasers. 43 of those sub-purchasers have entered agreements with D1. Thus these 43 cannot be said to have the same common interest with the 213 plaintiffs. It was also queried whether these 43 sub-purchasers came within the 213 plaintiffs.

[70] Learned counsel for the plaintiffs submitted that the identity of the 217 plaintiffs (including the named four) was made in a letter (P34) on whose behalf SP7 filed an earlier action. He also submitted that in a representative action, the plaintiff need not

identify each and every person he is representing. I agree. The case of *Jok Jau Evong & Ors v. Marabong Lumber Sdn Bhd & Ors* [1990] 2 CLJ 625; [1990] 2 CLJ (Rep) 169 was cited, where Haidar J said:

> A plaintiff suing in a representative capacity does not have to obtain the consent of those whom he purports to represent and the fact that there are two opposing factions within the Kayan community does not prevent this action from being a representative action.

[71] In my view the exact identities of the persons whom the four named plaintiffs are representing is not an impediment to commencing a representative action so long as they are a class of persons with a common interest and a common grievance. I find that in this case, this representative action is properly constituted although if the plaintiffs succeed, they would be entitled to different measures of relief. The 213 unnamed plaintiffs whom the four named plaintiffs represent need not give their consent although they (the 213) are not liable to costs. In *EH Riyid v. Eh Tek* [1976] 1 MLJ 262) HRH Sultan Azlan Shah (then FJ) said:

> In a representative action the plaintiff is the self-elected representative of himself and others. He does not have to obtain the consent of the other persons whom he purports to represent, and they are not liable for costs, though by estoppel and *res judicata* they will be bound by the result of the case.

[72] The representative action is merely a device whereby all parties sharing a common interest and grievance, without being named as parties are represented so that the dispute may be finally determined through a simplified, inexpensive and convenient vehicle (see *Abdul Rahim v. Ling How Doong* [1994] 2 SLR 668). Lord Macnaghten in *The Duke Of Bedford v. Ellis & Ors* [1901] AC 1 on this said:

> Given a common interest and a common grievance, a representative suit was in order if the relief sought was in its nature beneficial to all whom the plaintiff proposed to represent.

[73] For these reasons the order for costs will be borne only by the four named plaintiffs. As a foot note, this court wish to make an observation that it finds it dumbfounding that three of these four named plaintiffs, although representing the interest of the other 213, have chosen not to appear in this trial to support their

A claims. This court can relate to learned counsel of the plaintiffs' lament that he found the presenting of his clients' case to be an arduous undertaking, although it must be added that he undertook this task in a most laudable manner. It is also sad to note the fate of the sub-purchasers but this decision is arrived at purely on the
B facts, and my finding that the plaintiffs who bear the burden of proof on their assertions have failed to discharge that burden cast upon them under s. 101 of the Evidence Act.

[74] For these reasons, this suit is dismissed with costs to be
C paid by the four named plaintiffs. The balance of RM20,000 from the sale is to be paid by D5 to D3.

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